

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. Ch. 151**

Re: *Otis Health Care Center*  
Docket #858

Land Use Permit #2W0894-2-EB

**Findings of Fact, Conclusions of Law, and Order**

This matter involves an appeal to the Environmental Board (Board) from Land Use Permit #2W0894-2 (Permit) and accompanying Findings of Fact, Conclusions of Law (Decision) issued by the District 2 Environmental Commission (Commission) to Otis Health Care Center (OHCC) authorizing the construction of a 58-car gravel parking lot adjacent to OHCC in Townshend, Vermont (Project).

**I. History**

On September 8, 2004, the Commission issued the Permit and the Decision.

On October 5, 2004, Deborah Whitney filed an appeal with the Board from the Permit and Decision, alleging that the Commission erred in its conclusions with respect to 10 V.S.A. §§6086(a)(1), (1)(B), (1)(G), (3), (4), and (8)(aesthetics).

On November 22, 2004,<sup>1</sup> Board Chair Patricia Moulton Powden convened a Prehearing Conference with the following participants:

OHCC by Lawrence G. Slason, Esq. and Albert LaRochelle  
Deborah Whitney

On November 24, 2004, the Chair issued a Prehearing Conference Report and Order. The Order holds that OHCC, as the applicant has 10 V.S.A. §6084(a) and Environmental Board Rule (EBR) 14(A)(1) party status, that Deborah Whitney EBR 14(A)(5) party status as to 10 V.S.A. §6086(a)(1)(water pollution), (1)(B), (1)(G), (3), (4) and (8)(aesthetics).

The parties filed prefiled evidence in accordance with the Prehearing Order. On March 18, 2005, the parties filed a Joint Stipulation and Settlement Agreement.

The Board deliberated on the parties' joint filing on April 13, 2005.

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<sup>1</sup> The Prehearing Conference was held beyond the 40-day time period established by 10 V.S.A. §6085(b). OHCC's attorney waived this provision.

## **II. Issues**

The issues in this matter are:

1. Whether the Project satisfies 10 V.S.A. §6086(a)(1)(water pollution), with respect to impacts on Ms. Whitney's well.
2. Whether the Project satisfies 10 V.S.A. §6086(a)(1)(B), with respect to stormwater and groundwater.
3. Whether the Project satisfies 10 V.S.A. §6086(a)(1)(G).
4. Whether the Project satisfies 10 V.S.A. §6086(a)(3), with respect to impacts on Ms. Whitney's well.
5. Whether the Project satisfies 10 V.S.A. §6086(a)(4).
6. Whether the Project satisfies 10 V.S.A. §6086(a)(8) (aesthetics).

## **III. Settlement agreements and the Board's responsibilities**

Act 250 and the Board favor the non-adversarial resolution of issues by parties, see 10 V.S.A. §6085(e) and EBR 16(D). Public policy also “strongly favors settlement of disputed claims without litigation.” *Dutch Hill Inn., Inc. v. Patten*, 131 Vt. 187, 192 (1973). However, the Board has the obligation to review any settlement reached between the parties. *Cersosimo Lumber Co.*, Land Use Permit #2W0957-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Nov. 29, 1995). This review must determine whether an affirmative finding can be made under all criteria on appeal, and the Board need not accept a settlement agreement if the necessary affirmative findings cannot be made, *Faucett Builders, Inc.*, Land Use Permit #4C0763-2-EB, Findings of Fact, Conclusions of Law, and Order at 6 (Aug. 6, 1996), or if the agreement contravenes any of the Act 250 criteria. *Pico Peak Ski Resort, Inc.*, Land Use Permit #1R0265-12-EB, Findings of Fact, Conclusions of Law, and Order at 4 (Nov. 22, 1995). *Accord, Andrew and Peggy Rogstad*, Land Use Permit #2S1011-EB, Findings of Fact, Conclusions of Law, and Order at 4 (December 12, 1996).

#### **IV. Findings of Fact**

Generally, a settlement agreement will present the Board with proposals on which the Board can base Findings of Fact, which can then, in turn, form the basis for the Board to make positive Conclusions of Law on the Criteria. *See, Re: Cersosimo Lumber Co., supra; Re: Faucett Builders, Inc., supra; Re: Andrew and Peggy Rogstad, supra.* The parties have presented such proposed findings in this case, and the Board adopts those Findings and Conclusions, as modified herein, and they lay the groundwork for the Board's analysis of the proposed settlement.

1. There is an unmaintained gravel logging road which extends along the northerly boundary of the property owned by OHCC.
2. Whitney's property boundary is located approximately 10 - 15 feet northerly of the road.
3. The road acts as berm which presently *intercepts and blocks* the natural flow of spring and stormwater runoff *originating from the watershed; the road* causing water to backup onto the Whitney property.
4. OHCC originally proposed to install two culverts beneath the roadbed to channel the water to drainage swales along the perimeter of the parking lot area.
5. In lieu of the culverts, OHCC will excavate a swale through the roadbed. The swale will allow water to flow naturally through the site and alleviate the impoundment of water upon Whitney's property.
6. OHCC will install a solid stockade type of wooden fence approximately 6 feet 6 inches in height and 80 feet in length along the southerly edge of the log road. The type of fencing is depicted on the parties' Joint Exhibit B.
7. In addition to the plantings required by the Permit and Decision, OHCC will plant five flowering shrubs in the area between the northerly edge of the log road and the Whitney boundary. The type of shrubs will be mutually determined by OHCC and Whitney. The location of the proposed fence and plantings are depicted on the parties' Joint Exhibit A.

#### **V. Conclusions of Law**

##### **A. The parties' proposed agreement**

In their settlement documents, the parties stipulate that the Board can issue a Land Use Permit providing that OHCC will alter the Project to replace two culverts to with a drainage swale, to install an 80 foot wooden fence, and to plant five additional flowering shrubs.

These changes require deleting Permit Condition 10 and Commission Decision Finding of Fact 17. Condition 10 of the Commission Permit presently reads:

The Permittee shall monitor and maintain the culvert(s) that will be installed on the right-of-way replacing the existing nonfunctioning culverts and ensure that the culvert(s) are properly sized and effective so as to not cause back up and/or flooding on the neighbors' properties.

Finding of Fact 17 of the Commission Decision presently reads:

The Applicant will be removing the blocked 15 inch culverts and installing two new 24 inch by 18 inch arch culverts. A portion of the intermittent stream channel will be relocated.

The parties ask that the following conditions be incorporated into a revised Land Use Permit to be issued by the Board:

The Permittee shall remove the nonfunctioning culverts that are located within the unmaintained log road on the northerly boundary of the Permittee's property and will excavate a swale through the roadbed to allow water to flow naturally through the site so as not to cause impounding or flooding on the neighboring property.

The Permittee shall plant a row of Eastern Hemlocks 8 feet in height along the north side of the parking lot. The Permittee shall also install a solid stockade type fence approximately 80 feet in length and no greater than 7 feet in height along the southerly edge of the unmaintained log road. Permittee shall also plant five flowering shrubs (*rosa rugasas*) along the northerly edge of the log road between the Whitney boundary.

## **B. Discussion**

As noted, the Commission granted a permit to OHCC in this matter, finding that the Project met all of the criteria. Had there been no appeal, the Commission's Decision and Permit would constitute adequate protection of Vermont's environment and the values which the criteria seek to protect. *See, Re: River Station Properties, Trevor Cole, Kelley Taft, and RLO, LLC, #5W1436-EB, Dismissal Order at 2 (Jan. 13, 2005); Re: Vermont Agency of Transportation, City of South Burlington and Town of*

*Shelburne*, #4C1010-EB, Dismissal Order at 2 (May 17, 2000).

While Whitney's appeal challenged the Commission's determination, Whitney and OHCC now stipulate and agree that the Project, if revised with the inclusion of the swale, fence and additional plantings, will satisfy the Act 250 criteria on appeal.

The Board finds no reason to call the parties' agreement into question. The proposed swale will accomplish the same goal as the intended culverts - the prevention of an accumulation of water on Whitney's land. The fence and additional plantings resolve Whitney's aesthetic concerns. The changes which the parties propose do not involve construction on new lands, nor do they appear, from the evidence presented, to have the potential to create impacts on any other party or landowner.

The Board will therefore issue a revised permit which replaces Condition 10 of the Commission Permit with the conditions proposed by the parties. By this decision, the Board further deletes Finding of Fact 17 of the Commission Decision.

## **VI. Order**

1. The Project complies with 10 V.S.A. Ch. 151 (Act 250)
2. Finding of Fact 17 of the Commission Decision is deleted.
3. Condition 10 of the Commission Permit is deleted.
4. Land Use Permit 2W0894-2-EB is issued.
5. This matter is remanded to the District 2 Environmental Commission.

Dated at Montpelier, Vermont this 22nd day of April 2005.

ENVIRONMENTAL BOARD  
/s/Patricia Moulton Powden  
Patricia Moulton Powden, Chair  
George Holland  
W. William Martinez  
Patricia Nowak  
Karen Paul  
Richard Pembroke, Sr.  
A. Gregory Rainville  
Christopher Roy